



Supreme Court, U.S.

FILED

FEB 27 1998

CLERK

No. 97-1235

In The
Supreme Court of the United States
October Term, 1997

CITY OF MONTEREY,

Petitioner,

v.

DEL MONTE DUNES AT MONTEREY, LTD. AND
MONTEREY-DEL MONTE DUNES CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION

FREDERIK A. JACOBSEN
Counsel of Record
P.O. Box 6190
San Mateo, CA 94403
520 South El Camino Real
Suite 630
San Mateo, CA 94402
(650) 375-8991

11 pp

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. THE LIABILITY ISSUES WERE PROPERLY TRIED TO THE JURY.....	2
III. THE NINTH CIRCUIT PROPERLY APPLIED SUPREME COURT TAKINGS STANDARDS IN AFFIRMING THE VERDICT	6
IV. CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES:

<i>Armendariz v. Penman</i> , 75 F.3d 1311 (9th Cir. 1996)	5
<i>Chew v. Gates</i> , 27 F.3d 1432 (9th Cir. 1994)	4
<i>Cochran v. City of Charlotte</i> , 281 S.E.2d 179 (N.C. App. 1891), cert. denied, 288 S.E.2d 380 (1982)	3
<i>Del Monte Dunes v. City of Monterey</i> , 920 F.2d 1496 (9th Cir. 1990)	2, 5
<i>Del Monte Dunes v. City of Monterey</i> , 95 F.3d 1422 (9th Cir. 1996)	1, 2, 5, 6
<i>Dolan v. City of Tigard</i> , 512 U.S. 374 (1994)	1, 6, 7
<i>First English Evangelical Lutheran Church v. City of Glendale</i> , 482 U.S. 304 (1987)	2
<i>Jett v. Dallas Independent School District</i> , 491 U.S. 701 (1989)	3
<i>Lynch v. Household Finance Corporation</i> , 405 U.S. 538 (1972)	4
<i>Maryland Port Admin. v. QC Corp.</i> , 529 A.2d 829 (Md. 1987)	4
<i>New Port Largo, Inc. v. Monroe County</i> , 95 F.3d 1084 (11th Cir. 1996)	3
<i>QC Corp. v. Maryland Port Admin.</i> , 510 A.2d 1101 (Md. App. 1986)	3
<i>Williamson County Regional Planning Comm'n v. Hamilton Bank</i> , 473 U.S. 172 (1985)	2, 4

STATUTES:

42 U.S.C. § 1983	2
------------------------	---

I. INTRODUCTION

Petitioner City of Monterey's Petition for Writ of Certiorari does not justify the exercise of this Court's jurisdiction over a routine civil rights action that happens to involve a property owner plaintiff.

The Ninth Circuit faithfully followed this court's holdings in affirming the verdict, ruling that liability in a takings case is unavoidably an ad hoc factual inquiry. *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422, 1428 (9th Cir. 1996) (hereafter *Del Monte Dunes II*). The authorities relied upon by the Ninth Circuit, and ignored by the City, establish that such factual questions of liability in federal civil rights actions are properly decided by the jury. A recent *en banc* decision in the Ninth Circuit affirms this principle.

The City also tortures the Ninth Circuit's opinion to argue that traditional standards governing inverse condemnation actions were not properly applied in reviewing the verdict. The Ninth Circuit did nothing of the sort. The jury instruction, *submitted by the City at trial*, correctly set forth the applicable standards for determining whether a taking had occurred. *Del Monte Dunes II* at 1429. The Ninth Circuit's discussion of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) in that connection did not impose a new standard on the City because *Dolan* merely clarified, but did not change, the traditional standard.

The parade of horrors imagined by the City are unseemly and unfounded. Given that juries routinely decide municipal liability in a wide spectrum of civil rights actions, it is illogical to suggest that juries are

incapable of deciding constitutional liability only in takings cases. Moreover, as a practical matter, the Ninth Circuit's decision has little effect on the governments that have raised such a shrill cry herein. The State of California is immune from suit under 42 U.S.C. § 1983 because it is not a "person" as defined under the act and because the Eleventh Amendment bars damages suits against the State in federal courts. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) requires property owners to pursue state remedies for alleged takings in state courts. Thus state law regarding injuries will govern takings claims against California local governments. The only reason that this action was tried under the federal civil rights act was that, at the time of the 1986 denial of Del Monte Dunes development proposal, California did not provide a monetary remedy for inverse condemnation. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1507 (9th Cir. 1990) (hereafter *Del Monte Dunes I*). This Court's decision in *First English Evangelical Lutheran Church v. City of Glendale*, 482 U.S. 304 (1987), which required California to provide a monetary remedy, will result in cases such as this being filed in state court, not federal, after 1987.

II. THE LIABILITY ISSUES WERE PROPERLY TRIED TO THE JURY

The Ninth Circuit's analysis of the jury's ability to decide liability is correctly premised on the principle that takings liability is a factual inquiry. *Del Monte Dunes II* at 1428. Given that Del Monte Dunes sought damages, its

action was at law, and thus entitled to a jury determination of liability. *Id.* at 1427.

In *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), this Court foreordained the conclusion reached by the Ninth Circuit in upholding the jury's right to decide liability in civil rights actions seeking damages:

"Once those officials who have the power to make official policy on a particular issue have been identified [by the district court] it is for the jury to determine whether their decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur." *Id.* at 737 (emphasis added).

New Port Largo, Inc. v. Monroe County, 95 F.3d 1084 (11th Cir. 1996) simply ignores the *Jett* precedent.

The City does not dispute the inherently factual nature of an inverse condemnation claim. Nor could it given that it adduced dozens of exhibits and witnesses at trial relevant to the factual disputes at issue.

The City does not attempt to distinguish the numerous authorities the Ninth Circuit relied upon in affirming the jury's role in determining liability.

The City instead argues that no federal or state case has ever allowed a jury to decide liability in an inverse condemnation case. The City's legal research is a tad selective.

In *Cochran v. City of Charlotte*, 281 S.E.2d 179, 183, 190 (N.C. App. 1981), *cert. denied*, 288 S.E.2d 380 (1982), a jury decided inverse condemnation liability for airplane overflights. Likewise, in *QC Corp. v. Maryland Port Admin.*, 510

A.2d 1101 (Md. App. 1986), a jury decided inverse condemnation liability. The Maryland Supreme Court reversed the verdict for insufficient evidence, but did not disturb the principle that the jury was empowered to decide liability. *Maryland Port Admin. v. QC Corp.*, 529 A.2d 829 (Md. 1987).

The City also ignores that the inverse condemnation case in which this Court clarified the ripeness test arose from a *jury verdict* under Tennessee law. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 182-183 (1985).

If the City's arguments were adopted, federal district courts would be governed by state law, and a civil rights plaintiff would receive jury trial in some states and not others. This result would undermine the national uniformity of the civil rights act.

The City also fails to explain why the reasonableness of governmental conduct regarding land should be tried to the court but questions of reasonableness in cases such as police conduct are entitled to trial by jury. See *Chew v. Gates*, 27 F.3d 1432, 1443 (9th Cir. 1994).

In *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552 (1972), this Court categorically denied any distinction between property rights and the personal liberty interests:

" . . . [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right,

whether the 'property' in question be a welfare check, a home, or a savings account. In fact a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other."

In *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), an *en banc* panel of the Ninth Circuit affirmed the district court's denial of summary judgment on an equal protection civil rights claim brought by property owners:

"Of course, a jury might reject the plaintiffs' claim that the defendants were motivated by a desire to deflate the value of the plaintiffs' buildings, purchase them, and replace them with a shopping center. However, if proven at trial, the facts alleged by the plaintiffs are sufficient to support a claim of a violation of the equal protection clause." *Id.* at 1327 (emphasis added).

In *Del Monte Dunes I*, the Ninth Circuit ruled that Del Monte Dunes' similar claims were sufficient to establish liability if proven. *Id.* at 1508.

Del Monte Dunes proved at trial, just as the *Armendariz* plaintiffs alleged, that the City denied the development proposal in order to acquire the property. The City advances no principled reason why an equal protection claim premised on this theory should go to the jury, but not inverse condemnation claim based on the identical governmental conduct should not.

The reasonableness of the City's actions were properly decided by the jury.

III. THIS NINTH CIRCUIT PROPERLY APPLIED SUPREME COURT TAKINGS STANDARDS IN AFFIRMING THE VERDICT

The City concedes that the jury verdict was based upon a proper legal instruction defining the elements of inverse condemnation liability.

The jury was instructed that liability could only be found where the City's decision did not "substantially advance [a] legitimate public purpose" and that the City's decision would substantially advance a legitimate public purpose "if the action bears a reasonable relationship to that objective." *Del Monte Dunes II* at 1429. As the Ninth Circuit framed the issue it was reviewing: "The legitimate purposes - a legal determination - were defined in the instructions. The jurors were left with a reasonableness determination: was the denial reasonably related." *Id.*

The opinion then catalogues the abundant evidence supporting the jury's verdict that the City's actions were unreasonable. *Id.* at 1430-1432. The City does not contest the adequacy of this evidence.

The Ninth Circuit's affirmance of the jury verdict under the instructed standard does not create a new inverse condemnation test.

The Ninth Circuit's discussion of *Dolan* arose in the context of the nexus between the City's actions and its claimed public purposes. This nexus requirement is not peculiar to cases involving dedications. Denials of development that have no nexus to legitimate public purposes by definition do not "substantially advance" those purposes. The jury so found.

As the Ninth Circuit found, *Dolan* did not "disapprove this [traditional] test but, for Fifth Amendment purposes, proposed 'rough proportionality' as an adequate term." *Id.* at 1429. Thus *Dolan* did not create a new takings test. The test remains one of reasonableness, and "Del Monte provided evidence sufficient to rebut each of [the City's] reasons" for denial. *Id.* at 1431.

Moreover, the City conveniently overlooks the fact that this case involved excessive dedications for public use. Del Monte Dunes was required to dedicate the western one-third of the property as a public beach, to construct and maintain a public parking lot thereon, and provide a road through the development for access thereto. The City further required dedication of a public viewshed over the eastern one-third of the property. These dedications, when combined with the City's ultimate refusal to allow development on the remainder of the property, rendered the property unusable and unmarketable.

Thus the City's argument that *Dolan* should not apply because it is limited to dedications is factually wrong as well as legally incorrect. The City's required dedications of Del Monte Dunes' property were the basis for finding that the property was rendered undevelopable and unusable. Thus the Ninth Circuit's discussion of *Dolan* was appropriate, although not necessary to affirm the verdict.

IV. CONCLUSION

The jury in this action evaluated the evidence under the identical standards that this Court has created in its takings jurisprudence. Those standards are not challenged by the City. For the reasons given above, Del Monte Dunes requests the Court to deny the Petition for Writ of Certiorari.

Dated: February 25, 1998.

Respectfully submitted,

FREDERIK A. JACOBSEN

520 South El Camino Real,

Suite 630

San Mateo, California 94402

Telephone: (650) 375-8991

Counsel for Respondents